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Divorce--Power of the Court of Appeals to Reverse Judgment of Divorce

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if the trespass is committed with the intention of killing or doing the owner of the property great bodily harm, if he resists the trespass, in such case the trespass is committed with felonious intention against the owner, and he has the right to stand his ground and kill the felonious trespasser if he has reasonable ground to believe that it is necessary to protect his life or to prevent great bodily harm at the hands of the trespasser." *Baker* v. *Commonwealth*, 94 Ky. 305, 306 (1892).

The defenses applicable to the defense of property are not applicable as a defense to a homicide as a result of a controversy over land. The rights of the parties in such a controversy are subjects which should be litigated in the courts of civil jurisdiction. The guilt or innocence of the defendant, upon the criminal charge, does not depend upon whether he was right or wrong in the controversy relative to the land. Neither party can, by a breach of the peace, legally vindicate his rights whatever he conceives them to be, much less by going to the extreme of taking a human life. Neither party will be allowed to resort to the use of firearms or kill, except in the usual manner of self-defense. *Utterback* v. *Commonwealth*, 105 Ky. 723 (1899), *Commonwealth* v. *Bullock*, 24 K. L. R. 78, 67 S. W 992 (1902).

To what extent may a person protect his property in an indirect manner, such as the setting of springguns, traps, etc.? The general rule appears to be that a person may not do indirectly, the things that he may not do directly. A man would not be justified in defending his property by the use of instruments of destruction, where he would not be justified in taking life if his house or property was actually assailed by a person with a felonious intent. Wharton, Crim. Law, Sec. 570. *Gray* v. *Combs*, 7 J. J. Mar. 479 (1832).

C. F PACE.

DIVORCE—POWER OF THE COURT OF APPEALS TO REVERSE JUDGMENT OF DIVORCE.—In the recent case of *Autry* v. *Autry*, 237 Ky. 608, 36 S. W (2d) 15 (1931), the husband sued his wife for divorce on the ground that she had been guilty of such lewd and lascivious conduct as proved her to be unchaste. The wife denied the allegation of the petition, and counterclaimed for divorce on several grounds, including cruel and inhuman treatment. The chancellor granted the husband a divorce, and the wife appealed. The court held that, "although we are without power to reverse a judgment of divorce, yet we may consider the evidence for the purpose of determining whether alimony was properly denied or the custody of children was properly granted."

The prevailing rule in Kentucky, and in some other jurisdictions, is that no appeal lies from a judgment or order granting a divorce. *Chaudet* v. *Chaudet*, 231 Ky. 477, 21 S. W. (2d) 812 (1929).

In this country there is no tribunal having the jurisdiction of the ecclesiastical courts. When the colonies and the states of the union adopted the common law of England they did not adopt the ecclesiastical law pertaining to marriage and divorce. *Ackerman* v. *Ackerman*,

200 N. Y. 72, 93 N. E. 192 (1910), *Cotter* v. *Cotter*, 225 F 471, 139 C. C. A. 453 (1915).

At common law the ecclesiastical court had exclusive jurisdiction of divorce. The chancery court did not assume either original or concurrent jurisdiction in divorce cases. In the absence of constitutional provision or express legislation, no American tribunal has jurisdiction to grant divorce. *Crugom* v. *Crugom*, 64 Wis. 253, 25 N. W 5 (1885). The jurisdiction to grant divorce is generally conferred by provisions of the constitution prohibiting legislative divorces and conferring such jurisdiction upon equity courts, and also by codes and statutes fixing the causes for divorce and prescribing rules of procedure. The forms of the statute vary, but generally the jurisdiction is conferred in express terms and is not to be inferred from the general jurisdiction in all civil cases. *Herron* v. *Herron*, 16 Ind. 129 (1861), *Ewing* v. *Ewing*, 24 Ind. 468 (1865), *Heatherwick* v. *Heatherwick*, 32 Ill. 73 (1863). Our courts have jurisdiction to grant divorces only when such jurisdiction has been expressly conferred on them by statute. *Judson* v. *Judson*, 171 Mich. 185, 137 N. W 103 (1912). But such courts may grant alimony without divorce, the equity jurisdiction being exercised to prevent multiplicity of suits and because the law affords no adequate remedy by which the wife can recover such support. *Galland* v. *Galland*, 38 Cal. 265 (1869), *Glover* v. *Glover*, 16 Ala. 440 (1849), *Butler* v. *Butler*, 4 Litt. (Ky.) 201 (1823). In exercising the jurisdiction conferred by statute, the courts are largely governed by the rules of the English ecclesiastical courts, except insofar as that law has been modified by statute. *Crump* v. *Morgan*, 38 N. C. 91, 98, 40 Am. Dec. 447 (1843). Although a suit for divorce is not a suit in equity, and therefore not within the ordinary jurisdiction of a chancery court. *Emerson* v. *Emerson*, 120 Md. 584, 87 A. 1033 (1913), yet, except as the procedure may be governed by statute, the courts will apply the rules and principles of equity. *Stone* v. *Duffy*, 219 Mass. 178, 106 N. E. 595 (1914).

In a majority of the jurisdictions it is the rule that an appeal lies from a final decree of divorce. In Arkansas, Indiana, and Washington an appeal lies by reason of a constitutional or statutory provision allowing appeals from final judgments. In California, Iowa, Michigan, Mississippi, Nebraska, and West Virginia, a divorce proceeding is considered as a suit in chancery and an appeal from a final decree is allowed under the constitutional or statutory provisions governing appeals in chancery. In Kansas, Tennessee, and Wisconsin, an appeal from a final decree of divorce is expressly authorized by a constitutional or statutory provision, while in Illinois, North Carolina, and Pennsylvania, an appeal is allowed from a final decree without question. On the other hand, in the federal courts, and in Kentucky, Massachusetts, Missouri, Ohio, and Rhode Island, appeals are not allowed from a final decree of divorce.

The rule that the Court of Appeals of Kentucky has no jurisdiction to review or reverse a decree of divorce, was originally laid down in a statute enacted in 1816 which provided that "no writ of error shall

be brought or sued out from any court of equity hereafter obtained, granting a divorce from the marriage contract" *Thornberry* v. *Thornberry*, 4 Litt. (Ky.) 251 (1823), *Maguire* v. *Maguire*, 7 Dana (Ky.) 181 (1838), *Pence* v. *Pence*, 6 B. Monroe (Ky.) 496 (1846). Perhaps the reason for the enactment of 1816 was the inconvenience that might result from annulling a valid divorce upon a writ of error which might be prosecuted after one of the divorced parties had contracted another marriage; but that reason does not apply to a void divorce, which could never legalize a subsequent marriage of either of the parties.

Kentucky Statutes, Section 950-1, provides " but no appeal shall be taken to the Court of Appeals as a matter of right from a judgment for the recovery of nor to reverse a judgment granting a divorce " This statute expressly forbids the Court of Appeals to reverse a judgment granting a divorce, although it may review the judgment in a divorce case in other respects. *Shehan* v. *Shehan*, 152 Ky. 191, 153 S. W 243 (1913). According to the prevailing Kentucky view, it is not only the right, but the duty of the court to review the evidence where the mind is left in doubt on issues of fact involving alimony, or the custody and maintenance of children. *Evans* v. *Evans*, 229 Ky. 20, 16 S. W (2d) 485 (1929), or to determine whether the property rights of the parties have been properly adjusted. *Pleasnick* v. *Pleasnick*, 215 Ky. 281, 284 S. W 1070 (1926).

BERT HOWARD.

ATTORNEY AND CLIENT—NEGLIGENCE OF AN ATTORNEY IN PREPARATION OF A WILL.—In the recent case of *Schirmer* v. *Nethercutt*, 157 Wash. 172, 288 Pac. 265, decided in 1930, the plaintiff employed the defendant attorney to draw a will for the grandmother of the plaintiff. The will was duly prepared in accordance with the instructions given by the grandmother. By the terms of the will plaintiff was a legatee and was to receive one-half of the residue of her estate. The defendant carelessly allowed plaintiff to witness the will thereby causing plaintiff to lose his one-half residuary share of the estate. Held, that since plaintiff was not permitted to take under the will he was entitled to recover the value thereof from the person responsible for its loss through his negligent breach of trust.

The word "attorney" is derived from the Latin word *attornare* which means proxy or agent. And an attorney is essentially an agent of and for his client, the general principles which control in matters of agency also being applicable to attorneys. The special undertaking of an attorney is to establish or protect the rights of his client, whether relating to life, liberty, person, reputation or property. This necessarily creates a relation of trust and confidence between them which measures and defines the extent of the attorney's duty. The very fact of employment is sufficient to raise between the parties a contractual relation. Then, any controversy between them must be adjudicated upon the basis of this contract, unless the wrong complained of is some tortious act, actionable per se. That actions for malpractice against an attorney are based on breach of contract has been generally recog-